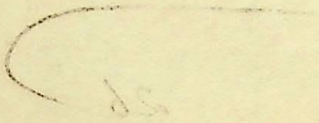

V. I. No. 1.

CIVIL JUDGMENTS, NOS. 1—7.

CRIMINAL JUDGMENTS, No. 1.

The Punjab Law Reporter,

A MONTHLY JOURNAL

CONTAINING

CASES DETERMINED BY THE CHIEF COURT, PUNJAB,
THE FINANCIAL COMMISSIONER, PUNJAB,
AND OTHER LEGAL MATTERS.

EDITED

BY

DHARM DAS SURI,

VAKIL, HIGH COURT, NORTH-WESTERN PROVINCES,
AND PLEADER, CHIEF COURT, PUNJAB.

(JANUARY 1900)

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LIST OF CASES REPORTED.

CIVIL.

CRIMINAL.

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APPEAL DISMISSED FOR DEFAULT—*Application to restore the appeal also dismissed for default—Second application for the same purpose—Appeal—Civil Procedure Code, Section 588—Review—Civil Procedure Code, Section 622—Miscellaneous Proceedings—Civil Procedure Code, Section 647.*

In this case the appeal was dismissed in default. An application to restore the appeal was also dismissed in default. A second application was made for the same purpose. The Lower Court rejected it, on the ground that it could not lie.

Held, that there is no special provision in the Civil Procedure Code for applying to re-admit an application to set aside an *ex-parte* decree dismissed in default.

Held, also, that no appeal lies under Section 588, Civil Procedure Code, against the order passed on the second application, on the ground that the order passed on the second application cannot be held as settling the question of re-admission of the appeal to hearing, which had been disposed of by the order on the first application.

Held, further, that the order passed on the first application was appealable ; and the second application could be treated as a petition for review.

Held, that Section 647, Civil Procedure Code, had no application to the circumstances of the case and the application should be held to be one in an appeal and not a separate miscellaneous proceeding.

CIVIL JUDGMENTS.

(Chief Court, Punjab).

No. 1.

Before Mr. Justice Anderson and Mr. Justice Robertson.

NAZRA,—(DEFENDANT),—APPELLANT,

Versus

SULTAN and others,—(PLAINTIFFS) AND KAZIM—DEFENDANT, } RESPONDENTS. } APPELLATE SIDE.

Case No. 977 of 1896.

Custom—Alination—Unequal distribution of ancestral land by father in favour of one son to the prejudice of other sons—Gift—Muhammadan Alphials of Rawalpindi District—Claim for possession of land.

One Shah Nawaz, a Muhammadan Alphial of the Fatehjang *tahsil* of the Rawalpindi District, owned certain ancestral lands. He gifted to Nazra, one of his sons, about 36 ghumaos and a seventh share of *shamilat* leaving for each of the remaining five sons about 6 ghumaos and $\frac{1}{7}$th of shamilat.

On the suit of the sons against Nazra, after the death of their father Shah Nawaz, it was *Held*, that a custom exists amongst *Alphials*, as well as amongst other tribes of the neighbouring country, sanctioning an unequal distribution of property by a father. But whilst one son may be preferred at the pleasure of the father, he must not be unduly preferred, so as to practically disinherit his brethren.

The Court observed that, considering the quality of the soil and the conditions of climate prevailing in Fatehjang *tahsil*, the distribution contemplated by Shah Nawaz goes too near to disinherison and the Court allowed Nazra a double portion of the land.

Further appeal from the order of E. W. Parker, Esquire, Divisional Judge, Rawalpindi Division, dated 8th July 1896.

Babu K. P. Roy, Pleader, and *Mr.* S. P. Roy Advocate for appellant.

Mr. Browne, Pleader, for respondents.

JUDGMENT.

10th Novr. 1899. ANDERSON, J.—The return to remand made by our order of 18th July 1898 is to the effect that amongst *Alphials* a father has the power of distributing his property unequally amongst his sons, and no limit is laid down. The Subordinate Judge gives it as his opinion that, as no limit has been ascertained, the principle of Muhammadan law should be applied, and it should be held that a father so circumstanced might give away the whole of his land. The Divisional Judge (Mr. G. Leslie-Smith) gave it as his opinion that the existence of the custom had not been satisfactorily proved and that the general custom of the Punjab should be followed, *viz.*, the view Mr. Parker has taken of the case. That officer, however, did not properly understand the effect of the order passed by this Court in 1890, when the first Court's order was restored, which he takes to amount to a decision that a gift or distribution such as that now under consideration could not be valid amongst *Alphials*. The Divisional Judge had reversed the order of the first Court, which was favourable to the plaintiffs, and had, of his own motion, settled how far the gift should stand, at the same time concurring with the first Court in pronouncing the gift to have been an invalid one. The learned Judges who decided the appeal then said, "In our opinion the only issue in this case is whether the gift made was a valid gift. When the Lower Appellate Court found that it was not valid, we think the only proper course was to dismiss the appeal and leave the father, if so advised, to make a fresh gift or to appeal to this Court to uphold the gift already made." Shah Nawaz had put in no cross-objection as to the Divisional Judge's decision as to the validity of the gift as he might have done. The appeal was disposed of on a technical ground, and it was not meant to decide that such a gift could not possibly be made, else the learned Judges would not have said the Appellate Court should have left Shah Nawaz to

make a fresh gift, and this was the reason why Shah Nawaz executed a fresh document in 1893.

After referring to the evidence taken on remand with instances quoted, we have no doubt that a custom exists amongst *Alphials*, as well as amongst other tribes of the neighbouring country, sanctioning an unequal distribution of property by a father. The difficulty is to decide how far that power is limited and the decisions passed both in case amongst *Awans* referred to by Mr. Parker, *P. R.* 107 *of* 1894, and the case amongst *Ghebas*, *P. R. No.* 125 *of* 1893, show that the rights of the other sons have always to be considered, and that there must be no attempt made by the father to disinherit them. The reply given by *Alphials* to Question 48 in the Customary Law of Rawalpindi District is : " A father has no power to deprive one son of his share and dispose of it in favour of other sons, " which is in accordance with the decisions referred to besides being equitable in itself.

The principle which we think should be regarded as applicable in such cases is that, whilst one son may be preferred at the pleasure of the father, he must not be unduly prefered so as to practically disinherit his brethren.

In the present case Shah Nawaz owned about 63 *ghumaos* of land and some *shamilat*. He has given to Nazra $\frac{1}{4}$th of all his land to enable him to hold the *lambardari* of Mora before 1885 and in the deed of 1893 he has confirmed this gift. He has now given over 31 *ghumaos* of land in Danial, leaving over the balance, some 32 *ghumaos*, with some *shamilat* (not likely to be very profitable), to support his five remaining sons. His own death has somewhat simplified matters, as it is now out of his power to make any further dispositions in favour of Nazra, and we can treat the distribution now made as a final one.

In the case from the Dharnal, in the same District, Mehr Khan had given only 3,500 *kanals* out of 24,000 *kanals* to his younger son, Durab Khan, and he owned land in other villages as well; so this arrangement, left $\frac{5}{6}$ths of the Dharnal land (besides their chance of recovering the other lands which were under mortgage) to his other sons, who were not so numerous as Shah Nawaz' sons in the present case. The

parties were *Ghebas*, and their answer to Question 54 of the Customary Law is that "If a father during his life time divides his property amongst his sons, the usual custom is to divide it *Chundavand*," which is not the same as the answer given by the *Alphials*, that being as follows:- "The usual custom is to divide in such a case in equal shares, but a father would have power to divide his inheritance unequally in such a case."

If we are not mistaken, the arrangement contemplated by Shah Nawaz would give about 36 *ghumaos* and a seventh share of *shamilat* to Nazra, leaving for each of the other sons about 6 *ghumaos* and $\frac{2}{7}$ths of *shamilat* to be divided equally, and this, we think, considering the quality of the soil and the conditions of climate prevailing in Fatehjang *Tahsil*, goes too near to disinherison.

Although the point is not free from difficulty, we think under the circumstances of the case we shall avoid practically disinheriting the other brethren and yet sufficiently maintain the custom (which we hold to be established) of a father's right amongst *Alphials* to make an uneven distribution amongst his sons if we allow Nazra a double portion of land, and we amend the Divisional Judge's decree accordingly.

The appellant, instead of getting his decree for possession of $\frac{1}{6}$ths of the property, will obtain possession of his proportionate share of the land in Danial after deducting what will make up Nazra's share of the whole estate to $\frac{2}{7}$ths, reckoning the land given to him to hold the *lambardari* of *Mora* at $\frac{1}{7}$th of the whole.

Under the circumstances we think it right that each party should bear its own costs throughout.

Appeal accepted.

No. 2.

Before Mr. Justice Anderson and Mr. Justice Robertson

APPELLATE SIDE

NARSINGH DAS,—(DEFENDANT),—APPELLANT,

Versus

CHELA RAM,—(PLAINTIFF),—HUKAM CHAND,—(DEFENDANT),—RESPONDENTS.

Case No. 169 of 1897.

Non-joinder of parties—Civil Procedure Code, Section 34—Objection taken in proper time—Suit on hundis by one of the partners of the firm without joining as co-plaintiff, son and heir of the deceased partner.

One Chela Ram, a partner of the firm known as Lok Ram Chela Ram, brought a suit to recover money due on *hundis* drawn in favor of his firm by the defendants. Among others, objection was taken as to the non-joinder of all the persons entitled to sue. It was admitted that Lok Ram died many years ago and was succeeded by his son Narain Das, who had a share in the firm.

The suit was at first heard against Hukam Chand, one of the defendants *ex parte*, but on his application it was ordered to be re-heard, and he was allowed to put in a plea of non-joinder.

Held, that the suit must be dismissed. The objection must be held to have been taken in proper time. The Court observed that the suit was re-opened and re-heard when Hukam Chand came into it, and the merits were then gone into.

The Court refused to allow Narain Das to be impleaded as a defendant.

First appeal from the order of Khan Ahmad Shah, Additional District Judge, Gujranwala, dated 16th November 1896.

The Honourable Madan Gopal, *Sirdar* Gurcharan Singh, *Lala* Harkishn Lal, Advocates for appellant

Lala Ishwar Das, Pleader for respondent.

JUDGMENT.

ANDERSON. J.—This was a suit brought by a banker of Wazirabad to recover money due on *hundis* drawn in favor of his firm by the Defendants residents of Jhelum on a certain firm at Amritsar. There being no assets available at Amritsar, the *hundis* were dishonoured and Plaintiff's firm had to bear the loss. *7th Decr* 1899.

Several objections were taken as to jurisdiction and non-joinder of all persons entitled to sue, but the First Court overruling these found against the defendants and decreed the claim.

The present appeal is by one of the original defendants, *viz.*, Narsingh Das, who denied the authority of his partner Hukam Chand to bind the firm at Jhelum. It appears that the case was first heard *exparte* as regards Hukam Chand as ordered on 6th June 1896, but on his applying to the Court for setting aside the order passed against him this was done on 11th August and he was allowed to put in a plea of non- joinder.

The name of the plaintiff's firm is Lok Ram Chela Ram, but Lok Ram died many years ago and was succeeded by his son Narain Das, and in his examination on 26th August Plaintiff Chela Ram was obliged to admit, though

with reluctance, that Lok Ram's son Narain Das has a share in the firm.

In a case brought by Chela Ram against one Bishumbar Das heard lately in the Court of the Additional District Judge, Gujranwala, Narain Das was joined as a co-plaintiff.

In an appeal, No. 1149 of 1896, lately decided by a Bench of this Court, in which Chela Ram sued *Bawa* Mehr Singh on a bond, the objection af non-joinder was taken, and it was merely because the bond had been executed in the name of Chela Ram alone that it was overruled and he was allowed to sue alone.

In the present case the *hundis* are drawn in favour of the firm of Lok Ram Chela Ram, and not of Chela Ram, and the cause of action evidently accrues to whoever may be owner or owners of the firm at that time. *Lala* Ishwar Das for respondent has pointed out that Nar Singh Das, who now applies, took no objection to non-joinder of Narain Das on or before the first hearing, which so far as he is concerned must be held to have taken place on 6th June, and that no regard should be paid to the subsequent re-hearing when Hukam Chand, who has not now appealed, was permitted to intervene. After considering the point, we do not (think) this contention can be entertained. The suit was re-opened and reheard when Hukam Chand came into it and the merits were then gone into. All that the Court had done before Hukam Chand's intervention was to decide that it possessed jurisdiction to hear the suit. We must therefore hold that the objection of non-joinder was taken in proper time.

The ruling of this Court contained in *P. R.* 156 *of* 1889 seems applicable to this case, and bears a strong resemblance to it. There is no doubt that Chela Ram has been doing business at Wazirabad as if he were sole owner of the firm, as indeed he has styled himself in the replication printed at page 8, line 33, of the paper book, and entitled to sue alone for that firm; so in the case decided in *P. R.* 156 *of* 1889, Sewa Ram was looked upon at Rawalpindi as the person entitled to sue on behalf of the firm of Bhola Ram Daryana Mal, but would have been held not entitled to sue alone, but that the objection for

non-joinder was held to have been taken too late. There can be no doubt that whatever his exact relations may be with Narain Das he has himself admitted the latter to have an interest in the firm, and his name has been formerly added in suit. Mr. Madan Gopal has referred to *I. L. R.*, VI. *Cal.*, 815 and *I. L. R.*, VIII *All.*, 264, as authorities for the proposition that defendants had a right to have his name placed on the record, and *Lala* Ishwar Das quoted *I.L.R.*, XXVI *Cal.*, 409, as an authority for the view that Narain Das might now be made a defendant *pro forma*, the suggestion being that he would back up Chela Ram and admit his right to sue alone. The objection is of a technical nature, but we think that it goes to the root of the case, and that we must hold it was taken in time, as it was brought before the pleas on which the case was finally decided were taken. The defect is fatal and should not be cured by making Narain Das a defendant at this stage. In this view of the case it is scarcely necessary that we should decide the question of jurisdiction. We are disposed to think the Additional District Judge may be right, but as some of the *hundis* were executed at Jhelum and defendants were resident there at the time of suit, there could be no doubt as to the jurisdiction possessed by the Jhelum Court when suit was first brought.

The appeal is accepted for non-joinder of a necessary plaintiff and the decree reversed and appellant will get his costs in this Court and costs of Court below

Appeal accepted.

No. 3.

Before Mr. Justice Maude.

MEHAR ALI and others,—(PLAINTIFFS),—
PETITIONERS,
Versus
GANESH DAS and others,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Case No. 1016 of 1899.

Res-judicata—Civil Procedure Code, 1882, *Section* 13—"*Court of jurisdiction competent to try such subsequent suit.*"

Where both the suits were cognizable by a Munsiff of the first class, and the appeal against the decrees in both the cases could be preferred to the Divisional Court, but in consequence of the matter in dispute in the

first suit having been referred to arbitration no appeal lay, it was *held*, distinguishing *Punjab Record No.* 20 *of* 1891, *F.B.*, that the matter decided in the first suit could not be re-opened, and the decree based on the award operated as *res-judicata*.

Petition for revision of the order of J. G. M. Rennie, Esquire, Divisional Judge, Multan Division, dated 3rd January 1899.

Mian Muhammad Shafi, Advocate for petitioners.

Bakhshi Gokal Chand, Advocate for Defendants 1 and 2, and Lala Dharm Das Suri for Defendant 3.

JUDGMENT.

23*rd Novr.* 1899 MAUDE, J.—For the purposes of this judgment it is sufficient to set forth the following facts. The plaintiffs, Mehar Ali and Mullan Adamji were appointed by the defendants, Alla Bakhsh and Wahid Bakhsh and others as a kind of agents who sold for them certain timber. For the income realized from the sales of the timber the plaintiffs had to account to the owners of the timber. Alla Bakhsh and Wahid Bakhsh were entitled to receive Rs. 510, and the plaintiffs say that at the request of Alla Bakhsh and Wahid Bakhsh they paid this sum to one Ganesh Das on account of a debt due to him from Alla Bakhsh and Wahid Bakhsh. Ganesh Das admits receipt of this money. After this payment was made or is said to have been made, Alla Bakhsh Wahid Bakhsh and others sued the plaintiffs in order to recover Rs. 900.

The plaintiffs pleaded *inter alia* that they had paid Rs. 510 to Ganesh Das, and the question whether they had done so was directly put in issue. The case was referred to arbitration and the arbitrators found that they had not done so. The result was that a decree was given against them, and they have had to pay Alla Bakhsh and Wahid Bakhsh Rs. 510. That suit was decided in the Court of a 1st Class Munsif.

Now the plaintiffs have sued Ganesh Das and Alla Bakhsh and Wahid Bakhsh to recover Rs. 510 *plus* Rs. 177 due as costs of previous litigation *plus* Rs. 100 damages. This suit was heard and decided by the District Judge, who decreed in the plaintiffs' favour, mainly against Ganesh Das, as he held that the claim for Rs. 510 was *res-judicata* as against Alla Bakhsh and Wahid Bakhsh. On appeal the Divisional Judge dismissed the plaintiffs,

suit holding that there was no cause of action against Ganesh Das, and that the claim was *res-judicata* against the other defendants.

The plaintiffs have applied for the revision of the Divisional Judge's order as regards both points. The learned counsel for the petitioners has argued that the case may be regarded as one to recover money paid by mistake to Ganesh Das, but, according to the plaintiffs' own showing, there was no mistake. They say they were asked to pay the money to Ganesh Das, and did so, and Ganesh Das supports their statement. I think that the Divisional Judge correctly held that Ganesh Das cannot be made to give back the money, and that no cause of action arose against him.

As regards the question of *res-judicata*, the petitioners rely upon the Full Bench judgment of this Court, *Punjab Record* No. 20 *of* 1891, but the two cases are clearly distinguishable. In the present case the first suit was cognizable by, and was tried by, a 1st class Munsif, and the subject-matter of the suit exceeding Rs. 500, the appeal, had there been one, would have lain to the Divisional Judge. As a fact, the matter in dispute was referred to arbitration, and there was no appeal. In the second suit the case was also cognizable by a 1st class Munsif, and was of the same character, though, as a fact, it was tried by the District Judge, and the appeal lay to the Divisional Judge. Thus the Court which decided the first suit was a Court of jurisdiction competent to try the subsequent suit, while in both suits the appellate Court would have been the same, had there been an appeal in each case. The Full Bench ruling cited does not, therefore, govern the present case. I am unable to see that there has been any material irregularity in the Divisional Judge's proceedings, and there is no adequate ground for revision. The application is rejected with costs.

Application rejected.

No. 4

Before Mr. Justice Anderson and Mr. Justice Robertson.

GANDA MAL,—(DEFENDANT),—APPELLANT,

Versus

APPELLATE SIDE. THAKAR HARKISHEN, &c.,—(PLAINTIFFS),—RESPONDENTS,

Case No. 53 of 1897.

Suit premature when plaint filed—Plaint returned for amendment—suit maintainable when plaint re-presented—Mortgage : payments by mortgagor towards interest and principal—Mode in which accounts may be made up.

Held, that when a suit is premature on the date the plaint is filed, but is not so on the date when the plaint is re-presented after amendment, it was held that the suit should not be dismissed for being premature when it was filed.

Held, that in taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realized, over and above the interest to which the mortgagee is entitled, from the date of realization : or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal.

First appeal from the order of W. A. Harris, Esquire, District Judge, Amritsar, dated the 23rd December 1896.

Appellant by Messrs. Rattigan and Todar Mal, advocates.

Respondents by the Hon'ble Mr. Madan Gopal, Advocate.

JUDGMENT.

20th Nov. 1899. ROBERTSON, J.—The facts in this case are set forth at great length in the order of the Lower Court, and we do not propose to recapitulate them here in full.

The grounds of appeal urged are very numerous, but it will be best to dispose of first ground 12—"That the suit is premature."

It is alleged in support of this contention that the suit is based on a deed of 27th October 1879, which fixed the period of the lease at twelve years, "not to be cancelled before the expiry of that time," whereas this suit was filed on 17th October 1891. The appellants

contend that the twelve years must be taken to be twelve years from the date of the deed. The respondents' reply is twofold. First, it is contended that the deed of 28th October 1879 is merely an amplification of a prior deed of 9th. January 1879, and they point out that in that deed this same land had been leased for two years, *i. e.*, up to *Rabi*, *Sambat* 1938= 1881-82, and that the effect of the second deed was merely to extend the lease from one of two years to one of twelve years from *Rabi* 1936, which would expire in *Rabi* 1948=June 1891. It is urged that the greater part of the land is agricultural land, which is generally leased from *Rabi* to *Rabi*, and that this was done as usual. The two deeds were executed in the same year: and the second recites that its *raison detre* is that certain points in the first deed were not clear, and, therefore, the second was executed. Reading the two deeds together, it appears that the twelve years' lease of the second deed was intended to run from *Rabi* 1936 to *Rabi* 1948. The second deed gives no dates, but the first does, and gives the usual period for the expiry of an agricultural lease. The 27th October would be a most unusual and inconvenient date for such a lease to expire; and unless it were very clear that this was meant, it would be natural to give the other interpretation. We accordingly hold that the lease was for twelve years from *Rabi* 1936. But it is now also urged that the words added as a P. S. to the deed of 27th October 1879—"The conditions set forth above will remain in force, even in case of default of payment of the money, after the expiry of the term of 12 years"—mean that if the land had not been fully redeemed within twelve years the lease would be continued on the old terms for another twelve. This contention cannot be accepted. It is clear that the proviso was simply added at the last moment to prevent any difference as to the terms on which the lease should run on for any period after the expiry of the twelve years, which might expire before the full sum was made up. The deeds in question are all somewhat loosely worded, but this appears clearly to have been the intention.

It follows, therefore, that it must be held that the suit is not premature. We should also have been inclined to hold that, seeing that the plaint was returned for amendment on 8th March 1892, and not re-presented until the 16th March, the suit was not then premature,

The plaintiff, had he thought of it, could have altered the date of his plaint to 10th March 1892 and under the circumstances we should not be inclined to hold that the case could not be heard on its merits because when the plaint was first presented it may have been premature. 16 *W. R.*, page 47, *P. R. No.* 3 *of* 1893., *P. R. No.* 7 *of* 1895 *I. L. R.*, *XX All.*, page 478. *I. L. R.*, *II All.* page 832, *IV All.*, page 37, *V Cal.*, page 810. The authorities quoted to us by the learned counsel for the appellant are not altogether in point, as they deal mostly with the question of the period of limitation and hold generally that the suit is not time-barred, when the original plaint was presented within time, but the amended plaint was not. In those authorities, therefore, the subject is viewed from a different aspect.

The next point to be considered is the meaning of the contract between the parties.

It appears that Raja Sir Sahib Dial, the father of Thakar Bansi Lal, and head of the family, was anxious to provide for his son and his son's family suitably, and so set aside certain land for that purpose, yielding an income then estimated at Rs. 1,285 per annum. The Raja Sahib's intention was that Rs. 600 should go to Thakar Bansi Lal himself, Rs. 400 to his wife, and Rs. 200 was to be set aside to accumulate for the marriage expenses of Mohan Chand, son of Thakar Bansi Lal. This is clearly set forth in the 2nd deed, dated 28th October 1879, printed at page 30 of the paper-book. Thakar Bansi Lal however, was a very extravagant person, and immediately got into further debt, and on the second of November 1882 he executed yet another deed. It is contended for the appellant that the allowance of Rs. 600 to Thakar Bansi Lal was quite separate from that deed, and that Ganda Mal undertook in return for a nominal income of Rs. 1,285 to pay

Rs. 600 to Bansi Lal,
„ 400 to his wife,
„ 200 to be kept for Mohan Singh,
„ 582 interest on the mortgage.

„ 1,782

that is he undertook a liability of Rs. 1,782 in lieu of a nominal income of Rs. 1,285, as it is suggested, in

the hope that the land leased would yield in fact as much as that at least. The Lower Court has held that Thakar Bansi Lal had full control over the property, but, in deference to his father's wishes and authority, he did not venture to interfere with the Rs. 400 set aside for his wife; his income of Rs 600, however, was clearly at his own disposal, and that that was clearly included, and the interest, amounting to Rs. 582, set against it, and this appears to us to be the only reasonable explanation of the contract. The Rs. 600 was his private income; he got into debt and hypothecated it, in the deeds in question. It is alleged that Thakar Bansi Lal made a different statement in certain insolvency proceedings, which were abortive; but we do not think this fact sufficient to lead us to a conclusion contrary to that arrived at by the Lower Court, which appears to us the only reasonable one.

It was further urged that the condition to pay Rs. 400 per annum to the wife of Bansi Lal created a trust, and that neither Bansi Lal nor his heirs are entitled to any credit for that item. It is admitted that it has not been paid for many years, yet it is urged that defendants are entitled to credit for it as if it had been paid, and are only liable to account for it to Bansi Lal's widow. It is urged that Bansi Lal's widow could sue for it as a *cestui que trust*, and that the plea, that it had been accounted for to Bansi Lal's representatives, would be no answer to such a claim. We do not propose to discuss that point. As regards this suit, it appears to us that there was no privity of contract between Bansi Lal's wife and defendant, and no consideration as between them. What Ganda Mal did was to contract with Thakar Bansi Lal to make certain payments for him in consideration of the mortgage or lease of certain land; no trust was created, and Bansi Lal's representatives are clearly entitled to an account from the defendants of all the sums in their hands under the contract. No doubt had defendant Ganda Mal been able to reply that, in accordance with their contract, he had paid Rs. 400 per annum to Bansi Lal's wife, that might have been a good answer in that part of the case; but to admit that the money has not been so paid, and to decline to account for it on the ground that it was payable to a third party, is, under the

circumstances, no answer at all, for the obligation to pay to the third party was entered into with Bansi Lal and not with the third party. We, therefore, hold that Bansi Lal's representatives are entitled to credit for the whole income.

Having disposed of these points we next come to the accounts themselves. Here there is apparently much confusion, and the defendant has never shown any very great anxiety to clear it up, or to come forward with anything like a straightforward and comprehensible account; in fact he has put forward calculations made in such a peculiar manner as only to render confusion worse confounded. His main contention appears to be that no matter how much might be credited in one year above the interest and charges due to him, the principal was still to be undiminished and the rate of interest unreduced, any balance in plaintiff's favour being retained in his hands without bearing interest. This method is no doubt frequently resorted to by money-lenders in this province, and is in itself clearly unfair and inequitable, and could only be accepted when it is beyond all possibility of dispute that the parties contemplated it. We are unable to see any such clear and unmistakeable provision in the contract; indeed everything appears to us to point the other way, and we have accordingly no hesitation in setting it aside. It is further now contended that as a matter of fact there never was a balance in plaintiff's favour in any year.

As regards the accounts also, it is possible to some extent to clear the ground before we proceed to details. It is quite clear from a letter of Ganda Mal himself, that, after the death of Bansi Lal, Raja Sahib Dial paid off all that was due under these deeds, except the principal sum of Rs. 4,000 Ganda Mal, in writing to the Deputy Commissioner on 15th. February 1886, unequivocally states this (page 42 of paper-book). He says—"After the" "death of Thakar Bansi Lal the Raja himself made up" "accounts relating to the mortgage-money and the" "income accrued from the land, and paid from his" "own pocket, through the Tahsildar of Batala, Rs. 900" "in cash, which were found due by Thakar Bansi Lal" "over and above Rs. 4,000" Thakar Bansi Lal died on April 1883. It is not quite clear at what date Raja

Sahib Dial squared accounts, but in the absence of direct proof it may most reasonably be assumed that the settlement was up to the *Rabi* of 1883, as the lease ran from *Rabi* to *Rabi*, and we shall be as near the truth as we can get in this case if we assume as a basis that at the *Rabi* of 1883 nothing remained due under the lease except the Rs. 4,000, principal. The Rs. 2,050 for Thakar Bansi Lal's own maintenance, allowed by the Lower Court, had been allowed for and cleared up before that date. This is very much the same as the account given at page 112 of the paper-book by plaintiffs, who show Rs. 3,973, which is practically Rs. 4, 000 on 2nd November 1883, and as they admit this we will start with Rs. 3,973 due on that date.

There are several other facts on the record which make it clear that accounts were squared after Thakar Bansi Lal's death, and only the principal sum left due, which are discussed by the Lower Court and need not be noticed at length here. Ganda Mal's statement at page 23, line 18, of the paper-book and the incomplete account produced by the Court of Wards at page 40 of the paper-book, *inter alia* support this conclusion.

The method of calculation employed by the plaintiffs at page 112 *et seq* appears to us to be perfectly sound and in accordance with the principles laid down in Macpherson on Mortgages, at page 550, 7th edition: "In "taking the accounts, interest is, as a general rule, " "allowed on the payments of both parties. There are two " "modes, in either of which the accounts may be made up." "They may be permitted to run on from the date of the " "loan to the date of settlement, interest being allowed to " "the one party on the whole sum lent, and to the others " "on the sums realized over and above the interest to which " "the mortgagee is entitled from the date of realization; " "or the amount collected by the mortgagee in possession " "may be carried first to interest, and after paying that, to " "the liquidation of the principal, the account being closed " "at the end of each year, and there being allowed from " "year to year only reduced interest on the reduced " "principal." The plaintiffs have put in an account on the latter plan, but this result of the method would be the same. The defendant has care fully avoided submitting any account drawn on either of these plans.

It is contended for the appellant that the Manager of the Court of Wards admitted a considerable sum to be due, and a report of 20th June 1891, by the Manager of the Court of Wards to the Deputy Commissioner, is quoted as showing that Rs. 4,000 was then due. But it is quite clear from the correspondence (see letter of 1st December 1890 at page 41) that the Court of Wards was by no means satisfied with the conduct of the defendant, Ganda Mal, and was endeavouring, without success, to get a proper account from him ; and in the letter of 14th February 1891, from the Manager to Narain Das, a suit for the recovery of the land is threatened. No doubt in that letter there is an offer to pay anything that might be due, but what was due, if anything, was through defendant's own default never ascertained. The fact is, as will be shown later on, that there was nothing in the least complicated in the accounts ; they could have been drawn up in a perfectly simple and easily intelligible way, but that the defendant throughout has absolutely declined to submit anything like a proper and complete account in either of the forms laid down as correct for this purpose in Macpherson on Mortgages as quoted above. The only properly drawn account is that given by plaintiffs and printed at page 110 of the paper-book, and this was prepared under the orders of the Lower Court on 23rd December 1896 which must, therefore, be made the basis of our enquiry.

It only remains to consider whether or not any items which should have been debited to plaintiffs and credited to defendants have been omitted. This point has been discussed with great care by the Lower Court. It is urged before us, as in the Lower Court, that a separate item of Rs. 474—10 is due, and that this is admitted in the plaint at paragraph 10. No doubt this is so, but the plaintiffs evidently admit that sum and not Rs. 332+150 in addition; and the Lower Court has held that the plaintiffs' explanation that this Rs. 474 is the same as the Rs. 332+150 is accepted by the Lower Court, who points out that defendant, Ganda Mal, aas given no explanation of the separate sum of Rs. 474. With the exception of this Rs. 474, all the extra items appear to have been duly credited to defendant in the plaintiffs', accoun

Abiana Rs. 550 is allowed at the rate of Rs. 110 for each year from 1887 onward which for 5 years comes to Rs. 550. Rs. 270 for the *kundi* is allowed at page 115 in 1889 and interest on all loans is also allowed. After hearing the case very ably argued on every point for the appellant we are unable to conclude that the judgment of the Lower Court has been shown to be incorrect. Of course we are in no way concerned here with the obvious and admitted fact that the defendant has been drawing a very much larger income from the land than Rs. 1,285 per annum. That was the sum accepted as representing the annual income, and the accounts have been made upon that basis.

We may as well briefly notice that we do not consider that as regards defendant Ganda Mal in this suit, now appealing, there has been any such misjoinder as to render the suit unmaintainable, and as regards the claim for compensation for lands left uncultivated we consider that the appellant has altogether failed to make it out. The plaintiff has put in an intelligible account drawn up on a proper principle as pointed out above. The defendant has never put in any account drawn up on any principle which can be accepted as sound, and has clearly throughout endeavoured to evade the submission of any full and complete accounts.

The Lower Court has made a very careful enquiry and gone fully into every point, and we are not able to see that any reason has been shown for interfering with his finding.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

No 5.

Before Mr. Justice Gordon-Walker and Mr. Justice Maude.

APPELLATE SIDE.

BICHHA LAL AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

JAI PERSHAD AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Case No. 1332 of 1896.

Hindu Law—Presumption of joint family.—Power of a member of the family as a partner to strike balance of accounts—Contract Act, 1872, *Section* 251—*Limitation Act, Section* 21.—*Account books, proof of entries in —Evidence Act* 1872, *Section* 34.—*Set off. Civil Procedure Code, Section* 111.

In a suit for money on book accounts against a Hindu and his four sons on the allegation that they are members of a joint Hindu family and kept a shop managed by one of the sons, *Held*, that there is a presumption that the normal state of every Hindu family is joint. The degree of weight to be attached to this presumption must depend more or less on the circumstances of each case—*P. R.*, 102 *of* 1889, and 13 *of* 1883 *referred to.*

Held, that the sons must be considered partners in the business, and the act of one of them striking a balance would, under Section 251 of the Indian Contract Act, bind the other members of the joint family to the same extent as if he were their agent duly appointed for the purpose.

The word 'only' in section 21 of the Indian Limitation Act means that it must also be shewn that the partners signing the acknowledgment had the express or implied authority of the others to do so; in a going mercantile concern such authority is to be presumed as an ordinary rule.

It is not a condition precedent to accepting entries in account books as relevant under Section 34 Indian Evidence Act that it should be proved how the accounts came to be written, and that they were regularly kept in the course of business; what is necessary is that there should be other evidence in support of the liability sought to be established. 23 *W. R., P. C.* 391 *referred to.* The testimony of one of the plaintiffs and their *gomashta*, who were examined as witnesses for the defence, was considered sufficient corroborative evidence of the accounts to charge the defendants with liability, *P. R.* 63 *of* 1897, *referred to.*

Held, that where no specific sum was claimed as a set off by the defendants, and the provisions of Section 111 Civil Procedure Code had not been complied with by tendering a written statement containing particulars of any debt sought to be set off, the defendants could not be permitted to set off against the plaintiffs' claim certain unascertained sums of money alleged to have been been deposited with the plaintiffs on account of the defendants.

First appeal from the decree of Hafiz Anwar Ali, Additional District Judge, Karnal, dated 28th August 1896.

Lala Lal Chand, Pleader, for Appellants.

The Honorable Mr. Madan Gopal, Advocate, for Respondents.

MAUDE, J.—This is a first appeal from a judgment and decree of the Additional District Judge giving the plaintiff the full amount sued for, namely, Rs. 5,350 and costs. The defendants are five in number, Bichha Lal and his four sons, Tirkha, Munshi, Gogan, and Kundan, and the suit was brought against them all on the allegation that they are members of a joint Hindu family and kept a shop known as Bichha Lal-Tirkha Ram at Kaithal, the manager of which was Tirkha. Paragraph 2 of the plaint alleged that on September 24, 1892, Tirkha, as manager, adjusted accounts with the plaintiffs and struck a balance for Rs. 1,697-0-6 as the amount due to the plaintiffs on account of transactions extending from February 8, 1892. Paragraph 3 set out that subsequent to the striking of the balance the plaintiffs advanced Rs. 30,136-13-9 to the defendants and received Rs. 27,751-3-0 from them leaving altogether the principal sum of Rs. 4,082-11-3 due. To this Rs. 1,267-4-9 were added as interest and Rs. 5,350 were claimed in all. Bichha Lal and Tirkha put in one written defence, while the other three defendants filed a separate one. Both, however, were put in by the same pleader. Bichha Lal and Tirkha pleaded that they were quite separate from defendants Nos. 3, 4 and 5; that Tirkha was not manager; that he did not strike the alleged balance and was not competent to do so. It was also stated that the plaintiffs had advanced only Rs. 27,000 to the defendants Nos. 1 and 2, whereas the latter had paid the former Rs. 31,000, that the accounts were still running, and that Rs. 14,000 had been deposited with the plaintiffs by third parties on account of the defendants Nos. 1 and 2 as earnest money for *badni* or wagering bargains. Defendants Nos. 3 to 5 merely pleaded that they were separate from Nos. 1 and 2 and had no concern in the matter.

The first issue fixed was whether all the defendants are members of a joint family, and whether all of them are, or are not liable for payment of the debt due to the plaintiffs. This issue was decided against the defendants, the *onus probandi* having been placed on them to show separation of interests or partition. In appeal it is contended that the burden of proof was wrongly thrown on the defence, and that in the Punjab there is no presumption that a Hindu family is joint, specially as

regards business, and the decision reported in *Punjab Record*, No. 102 of 1889, has been cited in support of this contention. Therein it is no doubt observed that in the Punjab the true Hindu joint family is almost, if not quite unknown, and that no families really exist with all the connections kept up that the law books contemplate, but the judgment in no way lays down that in this Province the burden of proving affirmatively that a Hindu family is joint, rests on the person who alleges the fact.

What the learned Judges held to be proved was that in that particular case one son had separated twenty years before the suit and another fifteen years before, and had left the "firm" and all property connected with it and sought their fortunes in different places, never subsequently having any concern in the management of the family. On those findings, therefore, it was held that those sons did not belong to the "firm" and were not responsible for the trade debts incurred by it. On the other hand, it was held in *Punjab Record*, No. 13 of 1883, that it is settled law that the normal state of every Hindu family is joint, though this is only a presumption, to which the degree of weight to be attached must depend more or less on the circumstances of each case. In the present instance it is not denied that all the defendants continue to reside in the town of Kaithal in the ancestral house; the allegation is that Bichha Lal and Tirkha keep one shop, while the other three defendants transact business on their own account. The initial burden of proof was rightly thrown on them to substantiate this allegation, and after fully considering the evidence on the record we concur with the Additional District Judge's finding that all the defendants are joint in business. The evidence produced by the defendants to show that the various members of the family are not joint is extremely vague. Much reliance has been placed by their counsel on certain bonds and accounts which are said clearly to show separation of interests, inasmuch as the names of all do not appear in them, nor of any one as manager for the rest, but in our opinion a perusal of these documents tends rather to show jointness than separation. For example, although Bichha Lal and Tirkha alone profess to form one firm, we find two bonds executed jointly by those two and Munshi, the three executants being together described as "caste *mahajan*,

shopkeepers by occupation." As regards the accounts, it is no doubt true, as the defendants counsel has observed, that in various traders, account books accounts are shown as opened in the name of Bichha Lal and Tirkha alone, or of Kundan alone; but an examination of the various accounts produced indicates that payments were made to or by other members of the family irrespective of the headings of the accounts. Thus in Lachman Das's account nominally in the names of Bichha Lal and Tirkha there is a debit of Rs. 10,544-6-0, entered as on account of Bichha Lal and Munshi. Another account is headed as that of "Bichha Lal and Munshi" and another as that of "Gogan Mal and Bichha Lal," which last one also contains a credit of Rs. 219-2-0 given to Bichha Lal and Tirkha. Similarly we observe in Dhani Ram's account book an account of "Bichha Lal, Tirkha and Munshi," but on the credit side we find a payment of Rs. 100 made by Gogan. In Nanak's books appears the account of "Kundan" alone, but on the credit side there are no less than six payments entered as made by Munshi, while on the debit side appears an entry of the payment of cash to Tirkha. So far, then, as the account-books of third parties go, it would seem that any of the defendants were in the habit of treating the accounts opened in the names of others, as though they were their own or joint accounts. No doubt, the names of Gogan and Kundan appear less frequently, but this may be because they were much younger than the others, for it has been stated that they are some ten and twelve years younger, respectively, than Munshi, who is three years younger than Tirkha, and in the bond executed in December 1895, Munshi's age is given as 31 years. Gogan and Kundan were therefore little more than boys. The oral evidence is somewhat vague and unsatisfactory, but Tirkha admitted that on one occasion the accounts showed that all the defendants had jointly performed the usual ceremonies in connection with the *Dasehra* festival. We have no hesitation therefore in agreeing with the Additional District Judge that all the defendants were joint.

The next point for determination is whether Tirkha was the manager of the joint family. To prove this the plaintiffs produced two witnesses, Sant Lal and Fatteh Chand, whose evidence the Additional District Judge

believed. These two witnesses appear to be very ordinary persons whose evidence by itself would not be of much value, but considered with other circumstances there seems to be no reason for disbelieving it, as regards Tirkha's position in the family. He is the eldest son, and although the defendants' counsel says that Bichha Lal is not much more than 52 years old, he looks a great deal more, and clearly is a feeble old man as his looks testify, and his eyesight especially appears to be defective. It is therefore quite in accordance with the probabilities of the case that Tirkha was manager. We do not, however, consider that the point is of importance, because holding as we have held that all the defendants were joint in business, Tirkha was a partner in the business, and if he struck the balance, he was only doing an act usually done in carrying on the business of such partnership, and his act would under Section 251 of the Indian Contract Act bind the other defendants to the same extent as if he were their agent duly appointed for that purpose. To this proposition the defendants' pleader demurs on the ground that if no balance was struck by a duly constituted manager on September 24th, 1892, then the items debited against the defendants prior to that date are barred by limitation, because Section 21 of Act XV of 1877 expressly enacts that nothing in Sections 19 and 20 renders one of several joint partners chargeable by reason only of a written acknowledgment signed by any other of them. There is in our opinion no force in this argument. The word "only" in the Section in question has been held to mean that it must also be shown that the partners signing the acknowledgment had the express or implied authority of the others to do so, and in a going mercantile concern such authority is to be presumed as an ordinary rule. This presumption has in no way been rebutted in the present case, and therefore each of the defendants is bound by Tirkha's acknowledgment of indebtedness, if as a fact he struck the balance.

As regards this question of the striking of the balance, the Additional District Judge has discussed at some length the signature in the plaintiffs' account book purporting to be the signature of Tirkha, and it has been shown how his signature varies from time to time in a somewhat remarkable manner. Hence a comparison of the signature in dispute with others proved to be Tirkha's

real signature leads to little result. Two witnesses, Sant Lal and Fatteh Chand, were produced by the plaintiff to prove the striking of the balance in their presence.

Their evidence is of the usual oral type, and as they were deposing to an event alleged to have happened more than three year previously, it is of course easy to discover discrepancies in their evidence, as the defendants' pleader has done; equally, of course, had there been no discrepancies, it could have been argued that their evidence had been recently concocted. The Additional District Judge believed the witnesses and nothing has been urged before us tending to show that they had any sufficient inducement for giving false evidence. It has been argued that it is highly improbable that a balance should have been struck on the date alleged because the account between the parties had only commenced some seven months previously, and it is not usual to balance accounts after so short a period. To this the plaintiffs' counsel replied that among *mahajans* it is the regular custom to balance their accounts just before the *Dasehra* festival, and the defendants have not impugned the correctness of this statement; the balance purports to have been struck on Usoj Sudi 3, or exactly one week before the *Dasehra*. It seems natural then that the balance should have been struck on that date, and no good cause has been shown for disbelieving the evidence that it was struck. We consider, however, that in deciding whether the balance was duly struck it is essential to examine the question of the value which should be attached to the plaintiffs' account books generally, for the defendants' fifth ground of appeal is that they are entirely unreliable, and the learned pleader has attempted to show that they are also inadmissible in evidence. The Additional District Judge, on the other hand, has attached considerable importance to the plaintiffs' accounts on the ground that they are systematically and regularly kept. Before discussing the question we may note that no formal or other objection was taken to the plaintiffs' account books as a whole in the Lower Court, although a transliteration of the accounts sued on was produced by the plaintiffs at first and both parties were from the first represented by pleaders. The plaintiffs produced their account books

which consist of the following :—

1. *Kachi rokar.*
2. *Pakki rokar.*
3. *Kachi nakal bahi.*
4. *Pakki nakal bahi.*
5. *Bahi khata*
6. *Lekha bahi.*

The first two relate to dealings day by day in cash, the third and fourth to daily dealings in kind. The *bahi khata* is written up from the entries in the *pakki rokar* and *nakal bahi*, and so is the *lekha bahi*. It has been argued on behalf of the defendants that these account books were not admissible in evidence because they were not proved by any witness for the plaintiffs nor were they shown to have been regularly kept in the course of business, and in support of this contention we have been referred to the ruling of their Lordships of the Privy Council in the case of *Ganga Pershad* v. *Indrajit Singh* (23 *W. R., P. C.*, 391), but that decision was given when the law stood thus : " books *proved* to have been regularly kept " in the course of business shall be admissible as corroborative, " but not as independent proof of the facts stated therein." (Act 2 of 1855, Section 43). Section 34 of the Indian Evidence Act of 1872, however, enacts that " entries in books of account regularly kept " (*not proved to have been regularly kept*), " in the course of " business are relevant whenever they refer to a matter " into which the Court has to enquire, but such statements " shall not alone be sufficient evidence to charge any " person with liability."

And the illustration to this section runs as follows :— *A* sues *B* for Rs 1,000 and " shows " (not *proves*) " entries " in his account books showing *B* to be indebted to him " to this amount. The entries are relevant," &c., &c. From this it is clear in our view that it is not a condition precedent to accepting entries in account books, as relevant under that section, that it should be proved how the accounts came to be written, and that they were regularly kept in the course of business ; what is necessary is that there should be other evidence in support of the liability sought to be established. As a fact, however, in the present case, although it is true that no witnesses were produced on behalf of the plaintiffs to testify at the

books of account, one of the plaintiffs, Jai Pershad, and their *gomashta*, Sant Lal, were examined as witnesses for the defence and both were examined as regards the books, the former with reference to certain specified items of account, the latter more generally as to the system of accounts and the number of books maintained. Nothing was elicited to show that the books had not been regularly kept in the course of business. Then we have been referred to a comparatively recent ruling of this Court reported as No. 63 in the *Punjab Record of* 1897, in which it was ruled that a plaintiff was not entitled to succeed when the only corroborative evidence produced to support the entries in an account book was that of a person who deposed that the book had been written up by him from memoranda supplied by the plaintiff who did not himself give evidence or explain his absence from the witness box. Consequently it was held that as the plaintiff had failed to produce *the best evidence* to corroborate his accounts he was not entitled to succeed. In the present case it is not denied that Sant Lal was the plaintiffs' *gomashta* and that he kept the books ; he gave evidence in Court and so did one of the plaintiffs as witnesses for the defence, it is true ; nevertheless we fail to see what better evidence could have been tendered in support of the accounts as a whole while the defendants had the opportunity of showing or trying to show from the mouths of these witnesses that the books were not regularly kept and were unreliable. To return then to the specific item of the balance alleged to have been struck by Tirkha, we consider that the evidence of the two witnesses, Sant Lal, Brahman, and Fatteh Chand, already referred to, is good corroboration of the entry in the book of account, and that the evidence of the entry itself and of those witnesses combined is ample to charge the defendants with liability for the sum acknowledged, namely, Rs. 1,697-0-6, and interest as agreed on at the rate of 14 annas per cent. per mensem.

The next question relates to the amount of money advanced at different times to the defendants and the amount received from them by the plaintiffs. The plaintiffs alleged that they advanced in all more than Rs. 30,000, and received Rs. 27,751 ; the defendants admitted receiving Rs. 27,000, but alleged payment of Rs. 31,000. Thus

the defendants admitted having large transactions with the plaintiffs and have objected only to certain items shown in the plaintiffs' accounts. These are examined in detail in the District Judge's judgment, and we do not consider it necessary again to analyse them, because we are of opinion that while the defendants have themselves failed to produce any complete set of account books, they have also failed to diminish the value which the plaintiffs' complete set of books undoubtedly possesses, by any close cross-examination of the plaintiffs' *gomashta* as regards the disputed items of account. They had him in the witness box, they had the plaintiffs' books in Court with a transliteration of the accounts, but they confined their examination of the witness to certain transactions regarding the purchase of *mung* by the plaintiffs as agents for themselves. Hence as there is other evidence as to the payment of the chief items claimed by the plaintiffs, we consider that the account books coupled with the evidence are sufficient to prove the payment of those sums. Part of that evidence is no doubt merely the oral statements of witnesses, but some of the larger items in dispute relate to the purchase of grain on account of the defendants, and in regard to them there is documentary evidence in the form of octroi receipts for grain imported into the municipality.

The plaintiffs allege that they were commissioned to purchase *mung* for the defendants from a village called Mohan, the defendants deny having given any such commission, and say that the plaintiffs purchased for themselves, and on their own responsibility. The plaintiffs, however, produced octroi receipts in which the column "name, parentage and residence of the person importing goods" was thus filled in respect of imports of *mung*, "Bichha Lal and Tirkha Ram brought from Mohan to the shop of Jai Pershad and Tota Ram." The defendants have entirely failed to explain how their names came to be entered in these receipts if, as a fact, they had no concern with the matter.

Lastly, the defendants have appealed against the refusal of the District Judge to permit them to set off against the plaintiffs' claim certain sums described as *baiana* or earnest money which it is alleged were paid to the plaintiffs on account of the defendants and which

have not been given credit for. In their pleas the defendants Nos. I and 2 stated that Rs. 14,000 had been deposited with the plaintiffs by other persons for the defendants as earnest money for wagering on *badni* transactions, but no specific sum was claimed as a set off, nor did the defendants comply with the provisions of Section 111 of the Code of Civil Procedure and tender a written statement containing particulars of any debt sought to be set off. Both Jai Pershad, plaintiff, and his *gomashta*, Sant Lal, deposed that no items relating to *badni* transactions were shown in the account books, and the latter explained that unless profit and loss is adjusted, the accounts relating to *badni* transactions are not transferred to other *bahis*. We think therefore that the Additional District Judge was justified in refusing to allow the defendants to import the question of profits or losses on such bargains into the present suit. In regard to them the defendants can have recourse to such remedy as they may be advised to seek.

Considering then all the features of the case, we hold that no good reason has been shown for modifying the order of the Additional District Judge, and we dismiss the appeal with costs.

Appeal dismissed.

No. 6.

Before Mr. Justice Anderson and Mr. Justice Robertson.

JOWAHAR SINGH and others,—(DEFENDANTS),—APPELLANTS,

Versus

HARIA MAL,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE

Case No. 524 of 1899.

Suit for an account by an agent against his principal.—Contract Act 1872, *Section* 213.

Held, that an agent cannot sue his principal for adjustment of accounts and the mere fact that the principal keeps the account does not give the agent of necessity any right to claim "an account" from him.

Further appeal from the order of Captain G. C. Beadon, Divisional Judge, Amritsar Division, dated 5th April 1899.

Lala Lal Chand, Pleader, and Mr. Ganpat Rai, Advocate, for appellants.

Lala Ishwar Das and *Babu* K. P. Roy, for respondent.

JUDGMENT.

15*th Decr* 1899. Robertson, J.—This is a suit brought by the Plaintiff, agent, for an adjustment of accounts and recovery of money which may after adjustment of accounts be found due by the Defendants.

The Counsel for the Respondent at very great length endeavoured to argue that the suit was not in fact one for an account, but for money due as well as anything beyond the specified sum claimed in the plaint which might be awarded. It is as well to dispose of this point first. It is quite clear that this is a suit for account pure and simple. Under Section 7 (4) of the Court Fees Act it was necessary for the Plaintiff to value the suit, and he has done so at Rs 600, stating his readiness to pay any further stamps found due if on adjustment of account more than Rs. 600, is found due to him, and under Section 11, Court Fees Act, it is only in a suit for an account and in two other specified cases that such a proviso could be made.

The question therefore which has to be decided is whether in view of the trade connection between the parties, the Plaintiff can sue for an account from the Defendants and throw on them the onus of showing how much is due to Plaintiff instead of bringing his own definite claim for money due to him.

The Plaintiff is admittedly the Defendants' agent. Section 213 of the Contract Act lays down the duty of an agent to render account to his principal, but it is nowhere laid down in that Act that it is the duty of the principal to render account to his agent.

The Plaintiff's Counsel laid stress upon the fact that the Defendants keep accounts and therefore are bound to render an account to the plaintiff. The appeal to this Court is founded on the exactly opposite contention. "That the relation of the parties is not such as to impose upon the Defendants appellants an obligation to keep accounts, the Plaintiff is not therefore entitled to demand accounts."

It is obvious that the mere fact that the Defendants keep accounts does not give the Plaintiff of necessity any right to claim "an account" from them. The Plaintiff may be entitled to call upon Defendants to produce their account books, and may be entitled to examine them and to produce them in evidence, but this is quite a different thing from laying the onus of making out a statement of account upon the Defendants for the Plaintiff's benefit. In the absence of special circumstances, trade usage, or definite contract, it would not appear that Defendants were under any obligation to keep accounts for the Plaintiff and render accounts to him. The Plaintiff was no doubt under a statutory obligation to render accounts to the defendants, but there is no counter-obligation of the same nature provided for in the Contract Act or elsewhere so far as we are aware. It is contended for the appellants that the Plaintiff should, and as far as known, did keep his own accounts, and can claim any sum which he alleges to be due, and may be entitled to call upon Defendants to produce his books to support Plaintiff's claim, but he is not entitled to call upon Defendants to furnish him with accounts. There is a good deal of force in this contention. The right to claim a statement of accounts is an unusual form of relief, only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. It is urged by Respondents' Counsel that such a relationship exists in this case, and *P. R.* No. 122 *of* 1881 was quoted in support of this contention. The ruling quoted, however, appears to lean the other way, for the learned Judges remarked that "there must be something more than a mere relation of debtor and creditor before one party can be held and entitled to sue the other for an account, the Defendants must stand in some other relation to the Plaintiff as for instance that of agent, &c., &c." Here it is the Plaintiff who is the agent, the Defendants are the principal.

There is nothing whatever to show, nor was it as a matter of fact urged before the lower court, that there was any special usage of trade which imposes on the

Defendants the duty of keeping an account for the Plaintiff. And it is, speaking generally, this duty on the part of the Defendants to keep accounts for the Plaintiff which entitles the latter to succeed in a suit of this nature. The mere fact that Defendants did keep an account does not entitle the Plaintiff to this relief. He must be under an obligation to do so for the Plaintiff's benefit. The contention of the counsel for the Respondent that the Defendants were in any sense trustees for the Plaintiff is quite untenable. Story on the Law of Agency, paras 326,350,385 *inter alia*, were quoted to us in support of the Respondent's case but they have no bearing on the point in issue. The same may be said of the other authorities (Pearson's Law of Agency, p. 299 and Bowstead's Law of Agency, p. 247). The former is strong on the point of the principal's right to an account from an agent and the quotation from the latter merely deals with the case in which the accounts are too complicated to be dealt with, a point which does not arise here.

As regards the contention that the decision of the first court did not dispose of the case, we are of opinion that it did. This being clearly a suit by an agent for an account from his principal, the decision that the plaintiff was not entitled to sue for such an account decided the whole case. We therefore accept the appeal and restore the order of the first court dismissing the Plaintiff's claim with costs throughout.

Appeal accepted.

No. 7

Before Mr. Justice Anderson and Mr. Justice Robertson.

REVISION SIDE.

GANDA MAL,—(PLAINTIFF),—PETITIONER,

Versus

Mussammat SUGHRA BIBI,—(DEFENDANT),—RESPONDENT.

Case No. 403 of 1899.

Appeal dismissed for default—Application to restore the appeal also dismissed for default—Second application for the same purpose—Appeal—Civil Procedure Code, Section 588—Review—Civil Procedure Code Section 622—Miscellaneous Proceedings—Civil Procedure Code, Section 647.

In this case the appeal was dismissed in default. An application to restore the appeal was also dismissed in default. A second application was made for the same purpose. The Lower Court rejected it, on the ground that it could not lie.

Held, that there is no special provision in the Civil Procedure Code for applying to re-admit an application to set aside an ex-parte decree dismissed in default.

Held, also, that no appeal lies under Section 588 Civil Procedure Code, against the order passed on the second application, on the ground that the order passed on the second application cannot be held as settling the question of re-admission of the appeal to hearing, which had been disposed of by the order on the first application.

Held, further, that the order passed on the first application was appealable; and the second application could be treated as a petition for review.

Held, that Section 647 Civil Procedure Code, had no application to the circumstances of the case and the application should be held to be one in an appeal and not a separate miscellaneous proceeding.

Considering the circumstances of the case and the extreme remissness shown by the petitioner in prosecuting the case after his appeal had been once dismissed for default, and the application for review not having been regularly made, the Court declined to interfere on the revision side.

Petition for revision of the orders of Lala Makhan Lal, District Judge, Gurdaspur, dated 27th June 1898 *and* 14*th November* 1898.

Mr. Duni Chand, Advocate, for petitioner.

Mr. Dhanraj Shah, Advocate, for respondent.

JUDGMENT.

ANDERSON, J.—The question before us for decision in the present case is whether an order passed rejecting an application to set aside order passed refusing to restore to the file an appeal dismissed in default, the said order having been passed in the absence of the applicant on the ground that the proceeding was not of a miscellaneous nature as contemplated by section 647 Civil Procedure Code but was a proceeding in a suit or appeal, should be set aside. *30th Novr.* 1899.

The party aggrieved has applied to this court on the revision side but subsequently put in an application that his grounds for revision might be considered as an appeal under section 588, clause 27 and section 589.

The learned Judge, who, by an order in Chambers admitted the case to a hearing before a Bench, wrote as follows in his note. "The Additional District Judge's order is probably opposed to the practice prevailing in the Civil courts but if he be right in his law, a person

whose application to restore an appeal dismissed in default is also dismissed has no remedy. Counsel for respondent says he is entitled to apply for review of the second order of dismissal but, if this is the right view, should not the second application be treated as one for review? There is also the question whether an appeal lies to this court or only an application for revision." We find in the Code no special provision for applying to re-admit an application to set aside an *ex parte* decree dismissed in default. In this case the Additional District Judge has declined to enquire whether the petitioner when applying before him was entitled to a rehearing of his appeal owing to his failing to prosecute his application with due diligence, and, whilst admitting his theoretical right to proceed under section 558 Civil Procedure Code, he holds he had lost it and by implication holds that his second application, cannot be treated as a renewed application for readmission of an appeal, and does not lie at all.

Petitioner's counsel has argued before us that the application in question must be treated as a miscellaneous proceeding and not as a part of the proceedings of a suit or appeal and has referred us to *Indian Law Reports* XVIII *Bombay* page 59 and *Indian Law Reports* X *Calcutta* 416 as authorities for holding that section 647 is meant to cover such proceedings as that now under consideration and advances the proposition that every informal proceedings was reckoned as miscellaneous and at last after various rulings had been given on the point execution proceedings alone were held to be excluded and the law altered by act VI of 1892, section 4.

He also contended that in any view of the case the District Judge's order amounts to one under section 556 Civil Procedure Code and is consequently appealable under section 588.

Both these points are contested by the other side who admits that petitioner could have applied for review of the Additional District Judge's first order, dismissing application in default, or could have appealed that order but demurs to the argument as to the operation of section 647.

After carefully considering the case, we are of opinion that no appeal lies to this court as the order now passed cannot be held as settling the question of readmission of the appeal to hearing, which had been disposed of by an earlier order.

We think however on the analogy of *Indian Law Reports* XXVI *Calcutta* 599, that the petitioner may have had a right to apply for review of the Additional District Judge's order dismissing his first application in default, although he might also have appealed it under provisions of sections 556 and 560, and that the Judge might have possibly so treated the application before him and need not have necessarily gone so far as to hold that it could not lie at all.

Considering, however the circumstances of the case and the extreme remissness shown by the petitioner in prosecuting the case after his appeal had been once dismissed for default, we are not prepared to hold that the Judge was bound to go very deeply into the question by way of review or that he could not have rejected it summarily under the provisions of section 626 Civil Procedure Code. The Judge was probably wrong in holding that he had no jurisdiction to entertain the application, but as it was not regularly made as an application for review, we scarcely think it necessary on the Revision side to order him to treat it as such and to re-open the case. His order as regards the inapplicability of section 647 appears to be correct and the application should be held to be one in an appeal and not a separate miscellaneous proceeding. We therefore decline to interfere and dismiss the petition allowing respondent her costs.

Petition dismissed.

CRIMINAL JUDGMENTS.

(Chief Court, Punjab.)

No. 1

Before Mr. Justice Gordon-Walker.

Mussammat MUHAMMAD NISSA,—(ACCUSED),—
PETITIONER,
Versus
THE CROWN,—(RESPONDENT).

REVISION SIDE.

Case No. 1490 of 1899.

Bigamy—Indian Penal Code Section 494—Means of acquiring knowledge if the husband was alive.

Held, that where there was no evidence that the woman *knew* that her husband was alive, but she had the means of acquiring knowledge of the fact had she chosen to make use of such means, a conviction could not be supported. The English law as to the absence of the husband or wife is the same as that embodied in the exception to section 494 Indian Penal Code.

Petition *for revision of the order of the Sessions Judge, Delhi Division, dated 5th October 1899.*

Mian Muhammad Shafi, Advocate, for petitioner.

JUDGMENT.

GORDON-WALKER, J.—This case comes before me (1) on petition for revision by *Mussammat* Muhammad Nissa, who has been convicted by the District Magistrate of an offence under section 494, Indian Penal Code. She was convicted of this offence and Mehr Ilahi, with whom she

9th Decr. 1899.

contracted the second marriage, was convicted of abetment, each being sentenced to pay a fine of Rs. 20. (2) The cases of both are reported by the Sessions Judge for revision on the ground that imprisonment should have been part of the sentence.

There is no question that, if the conviction is right, imprisonment ought to have formed part of the sentence and the order of the District Magistrate was wrong to this extent, [section 245 (2) Criminal Procedure Code.]

It appears to me, however, that the conviction is bad in law and should be set aside. The District Magistrate in his judgment observes that the woman could have ascertained from complainant's relations that he was alive, and in Bombay, and that "she admits that she wrote to him in Bombay and must have heard therefore that he was there." But the woman's statement is actually to the following effect. "I had not heard of Muhammad Umar for many years and *his relations said they knew nothing* and would not help me. I sent letters *but got no reply. My brother sent the letters.*" The letters were apparently sent for the purpose of ascertaining whether complainant was alive and if any inference is to be drawn from the fact of the letters being sent and not answered, it would be favourable to the accused as showing that she tried to satisfy herself of complainant's existence and did satisfy herself that he was dead. Bombay was the last place at which complainant had been heard of, and it was natural that she should write there.

Then as to the remark that the woman *could have ascertained, &c.*, (she herself says she tried to and failed) it has been held in several English leading cases that where there was no evidence that the woman *knew* that her husband was alive, but she had the means of acquiring knowledge of the fact, had she chosen to make use of such means, a conviction could not be supported (Reg. *versus* Briggs, 1 Dears and B. 98, Reg. *versus* Curgenven, 35 L. J. N. S, M. C. 58, Reg. *versus* Tolson, 23 Q. B. D. 168.) The English law it may be noted, as to the absence of the husband or wife, is the same as that embodied in the exception to section 494.

In the present case the husband deserted his wife more than seven years before her second marriage, neg-

lected to support her and admittedly made no communication to her during the interval. The wording of the exception to section 494 is that "This section does not extend . . . to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time." The facts of the continual absence of the complainant for seven years and that the woman had not heard of him as being alive within that period are established, and the District Magistrate is wrong in supposing that she was deprived of the benefit of the exception because she might have ascertained (and even the possibility of this seems doubtful) from his relatives that he was alive. Apart from the authorities referred to above it is clear that to require the woman to show that she had made inquiries and had satisfied herself as to her husband's death is going beyond the plain words of the exception. As observed by Cave J. in the English case last quoted the woman "must simply prove that her husband has been continually absent for seven years; and if she can do that it will be no answer to prove that she had no reasonable grounds for believing him to be dead or that she did not honestly believe it."

As I hold the woman is entitled to the benefit of the exception it is unnecessary to consider the other question whether, in view of the *fatwa* of the Maulvies, the second marriage was void.

I set aside the conviction and sentence of the accused. The fine if realized will be refunded.

Conviction set aside.

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